

USING ZONING TO CREATE HEALTHY FOOD ENVIRONMENTS IN BALTIMORE CITY



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This paper is a preliminary effort to identify issues for discussion and further analysis. It presents the views of the authors and does not represent Georgetown University or our collaborators. To send comments, please contact Sandy Han at shh27@law.georgetown.edu.
December 2009

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Executive Summary

Food-related health issues have become a major concern for Baltimore City (“Baltimore”). A combination of economic factors has limited the access of many city residents to healthy foods. The resulting unavailability of healthy foods has contributed to the underdevelopment and poor health of children, and is fueling Baltimore’s current obesity epidemic. Of particular note – Baltimore’s obesity epidemic is associated with two of the city’s leading killers— cardiovascular disease and stroke.

The “built environment” – the surrounding area where people live – is a major influence on public health. A growing body of evidence indicates that the physical availability of healthy foods in neighborhoods influences dietary patterns and overall health. In addition, studies show that limited access to healthy foods is highly prevalent in lower-income neighborhoods, where the built environment features far more opportunities to buy junk food than healthy food.

Zoning can facilitate changes to the built environment that may increase access to healthy foods. Baltimore’s authority to zone for public health purposes is well established and this Report provides a short summary of legal limits related to zoning, and outlines Baltimore’s authority to zone along with relevant limits on that authority.

Throughout the United States, many municipalities are using their zoning authority to change the built environment to address public health concerns. This Report focuses on the potential use of zoning to increase healthy food access and to address food-related health problems in Baltimore. Specifically, this Report incorporates four of the ten recommendations from the Baltimore City Food Policy Task Force (finalized May 20, 2009) that have potential zoning implications:

- (1) encouraging urban agriculture;
- (2) expanding farmers’ markets;
- (3) improving the food environment around schools and recreation centers; and
- (4) establishing “healthy food zoning requirements,”

and reviews how demographically similar jurisdictions have used their zoning code with respect to these recommendations. Reviewed cities include Cleveland, the District of Columbia, Milwaukee, Philadelphia, Detroit, New York City, and Los Angeles.

Examples of zoning-related options available to Baltimore and employed in other cities include creating new “community garden” districts within the zoning code and encouraging farmers’ markets by making market activities explicitly-permitted uses within commercial districts. Baltimore can also use its zoning code to require fast food restaurants to maintain a certain distance from schools, thus limiting proximity to fast food while at school. Other options include incentivizing the development of full service grocery stores in underserved areas and/or encouraging healthy mobile food vending.

The Report concludes that Baltimore can redesign its zoning code in a way that promotes access to healthy foods and positively affects the health of many Baltimoreans.

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I. INTRODUCTION

Many Baltimoreans have difficulty finding and purchasing healthy foods, which contributes to a number of serious diet-related health problems. Children in families with limited access to healthy foods tend to be both underdeveloped, and in poor health.¹ A limited nutritional landscape also fuels² Baltimore's current obesity epidemic,³ which is associated with two of the city's leading killers – cardiovascular disease and stroke.

A city-dweller's ability to access healthy foods is driven in large part by the city's "built environment." Broadly defined, the built environment refers to any man-made surroundings that provide a setting for human activity⁴; for example, malls and roads. In addition to being a general driver of food access, studies indicate that socioeconomic differences in the built environment cause low-income Baltimore families to disproportionately bear the burden of food insecurity.⁵ As an example of these differences, large grocery stores⁶ tend to be less prevalent in poor neighborhoods,⁷ while the reverse is true for fast food restaurants.⁸

One of Baltimore's tools for increasing the physical availability of healthy foods is its zoning code. Zoning with a public health perspective can facilitate changes to the built environment that may help Baltimore families achieve better access to healthy foods. Across the U.S., a host of municipalities are employing zoning strategies for precisely this purpose.⁹

Using the zoning code to promote public health is nothing new. States have always had the authority to enact laws to protect public health,¹⁰ and in 1926, the U.S. Supreme Court was

¹ M. Black et al., *Food Security: Ensuring the Health of Baltimore's Babies 2* (2008) at 4, available at http://www.childrenshealthwatch.org/upload/resource/balt_foodsecurityreport_summer_08.pdf (last visited Jan. 13, 2009) (defining food insecurity as "lack of access to enough food for an active and healthy lifestyle due to financial constraints").

² *Id.* at 2 (suggesting that food insecure families eat unhealthy foods because they are affordable).

³ Fact Sheet: Overweight and Obesity in Baltimore City, 1997-2007 p. 1, Baltimore City Health Department Data Fact Sheet, Volume 1, No. 1 (July 23, 2008), available at http://www.baltimorehealth.org/info/2008_07_22.ObesityFactSheet.pdf (reporting that as of 2008, one third of Baltimore adults and one fifth of Baltimore high school students are obese)

⁴ A. Dannenburg, et al., *Leveraging Law and Private Investment for Healthy Urban Redevelopment*, 35 J. LAW, MED., ETHICS, SUPP. 4, 101, 102 (2007).

⁵ See Black, *Food Security: Ensuring the Health of Baltimore's Babies 2* (2008) at 3 (reporting that 13.5% of low-income Baltimore C-SNAP families are food insecure).

⁶ W. Purdue, *Obesity, Poverty and the Built Environment: Challenges and Opportunities*, 15 GEO. J. ON POVERTY L. & POL'Y 821, 823 (2008) (noting that supermarkets are the primary source of healthy foods).

⁷ S. N. Zenk, et al., *Neighborhood Racial Composition, Neighborhood Poverty, and the Spatial Accessibility of Supermarkets in Metropolitan Detroit*, 95 AM. J. PUB. HEALTH 660 (2005).

⁸ K. Morland et al., *Neighborhood Characteristics Associated with the Location of Food Stores and Food Service Places*, 22 AM. J. PREVENTATIVE MED. 23 (2002).

⁹ K. Hodgson, *Regulation of Food Access through Comprehensive Planning and Zoning* (April 2008) (unpublished discussion paper, on file with the Harrison Institute for Public Law at Georgetown University Law Center) (enumerating examples of novel zoning strategies, including: banning fast food restaurants in Concord, MA; creating an urban gardening district in Cleveland, OH; requiring residential developers to make an effort to attract grocery stores in San Francisco, CA).

¹⁰ See *infra*, discussion in Section II(A).

explicit that zoning in the name of public health was an acceptable exercise of that authority.¹¹ Examples of zoning in the name of public health include separating residential from industrial areas,¹² restricting building heights,¹³ and limiting the proximity of one structure to another.¹⁴

This Report focuses specifically on the use of zoning to increase access to healthy foods.¹⁵ The relationship between the zoning code and improved access to healthy foods has two parts. The first part is the connection between zoning and the built environment. Examples of this connection include requiring food retailers to meet health-related performance targets¹⁶ in order to qualify for zoning permits, or creating special urban gardening “districts” to incentivize the growth of fresh produce in urban areas. The second part is the connection between the built environment and food availability. In short, more full-service grocery stores and community gardens, combined with fewer fast food restaurants, means higher availability of healthy food.

On May 20, 2009, the Baltimore City Food Policy Task Force released a list of ten strategies to increase food access in Baltimore.¹⁷ Four of those strategies have potential zoning implications: (1) encouraging urban agriculture; (2) expanding farmers’ markets; (3) improving the food environment around schools and recreation centers; and (4) establishing “healthy food zoning requirements.”

The body of this Report focuses on how Baltimore can use its zoning code to facilitate these options. Section II provides a Baltimore-specific zoning primer and outlines Baltimore’s legal authority to zone. Section III discusses similar efforts in cities that are demographically comparable to Baltimore, and Section IV concludes.

II. ZONING PRIMER

A. Police Powers of the States

The Tenth Amendment to the U.S. Constitution allows states to exercise all governmental powers, except those that the Constitution either prohibits, or gives only to the federal government.¹⁸ One of the states’ powers is the power to safeguard community welfare.¹⁹ This is referred to as a state’s “police power,” and its exercise is implied whenever a state protects the

¹¹ Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926).

¹² See J.S. Mair, M.W. Pierce & S.P. Teret, *The Use of Zoning to Restrict Fast Food Outlets: A Potential Strategy to Combat Obesity* (2005) at 37, <http://www.publichealthlaw.net/Zoning%20Fast%20Food%20Outlets.pdf> (last visited Dec. 2, 2009).

¹³ See *id.* at 33 (discussing building height restrictions, which were thought to increase availability of light and fresh air, which in turn was thought to be essential to good health).

¹⁴ See *id.* (noting that the spread of fire was of particular concern to developing towns).

¹⁵ There are at least two other legal topics related to food access that are not discussed in this report. They include: commercial free speech issues associated with restricting the marketing of unhealthy foods, and union contract and procurement issues associated with revamping the school food delivery system.

¹⁶ See Mair, *The Use of Zoning to Restrict Fast Food Outlets* (2005) at 25 (suggesting that performance zoning “could be used to promote healthier selection of food choices for consumers”).

¹⁷ See Baltimore City Food Policy Task Force, 2d mtg. (May 20, 2009) at 3, available at http://baltimorecity.gov/government/planning/downloads/0609/062309_Food%20Policy%20Meeting%202%20Minutes.pdf.

¹⁸ U.S. CONST. AMEND. X.

¹⁹ L.O. Gostin, *Public Health Law: Power, Duty, Restraint* (University of California Press 2d ed. 2008) at 79.

health, safety, or morals of its citizenry. Specifically, the police power is what allows a state to engage in zoning.²⁰

Unlike states, municipalities cannot naturally exercise all governmental powers. Local governments derive their power to make laws from the powers of the state in which they are incorporated. Traditionally, local governments have possessed only the powers that they absolutely require, and those that are otherwise granted to them by the state. This relationship between states and their municipalities is often referred to as Dillon's Rule, which requires the powers of municipalities to be interpreted narrowly.²¹

Most states have transitioned from Dillon's Rule to a form of local government known as "home rule," which allows municipalities greater authority to self-govern. "Home rule" states give municipalities the authority to make local laws on a broad array of topics affecting the health, safety, and welfare of communities.

B. Maryland's Delegation of Authority to Municipalities

Maryland is a home rule state. Its Constitution has strong provisions for home rule by both counties and cities (together termed municipalities).²² In Maryland, county and city governments have similar grants of authority, but they derive their powers from different constitutional provisions.²³ Further, Maryland allows for three forms of county government: traditional commission, charter home rule, and code home rule.

C. Baltimore's Governmental Structure and Authority to Zone

Although Baltimore is technically a city, the Maryland Constitution treats it as a "charter home rule" county.²⁴ As a charter home rule county, Baltimore has a charter that outlines the organizational framework of its government and provides for an elective legislative body and the election of an executive.²⁵ In Baltimore, the city council possesses legislative authority and governs jointly with the mayor. Both the mayor and the president of the city council are elected by citywide vote.²⁶ There are 15 members of the city council, with 14 members elected by single-member districts.²⁷

The express powers granted to Baltimore by the Maryland Constitution and the laws of Maryland are contained in Article II of the city charter. These powers total 68 and provide that

²⁰ *Euclid v. Ambler Realty* 272 U.S. 365.

²¹ *Id.* at 165, *See also* BLACK'S LAW DICTIONARY (8th ed. 2004).

²² M.D. CONST. ART. XI.

²³ M.D. CONST. ART. XI-A (authorizing home rule for counties); M.D. CONST. ART. XI-F (authorizing home rule for municipal corporations (cities)); MD CODE ANN. ART. 25A, 25B (West 2009) (containing the express powers granted to counties); MD CODE ANN. ART. 23A (West 2009) (containing the express powers granted to cities).

²⁴ MD CODE ANN. ART. 1 SECTION 14 (West 2009), MD CODE ANN. ART. 23A SECTION 9 (West 2009), MD CONST. ART. XI A.

²⁵ M.D. CONST. ART. XI-A.

²⁶ MARYLAND GENERAL ASSEMBLY, DEPARTMENT OF LEGISLATIVE SERVICES, MARYLAND LOCAL GOVERNMENT LEGISLATIVE HANDBOOK SERIES VOLUME IV (2006) at 41.

²⁷ *Id.*

“the Mayor and City Council of Baltimore shall have full power and authority”²⁸ over exercising them. In particular, section 27 grants to Baltimore the authority to exercise, “all the power commonly known as the Police Power to the same extent as the State has or could exercise that power within the limits of Baltimore City.”²⁹

While zoning laws (ordinances) have been upheld as constitutional exercises of the police power,³⁰ Maryland also expressly grants zoning authority to Baltimore in Article 66B § 2.01 of the Annotated Code. Article 66B provides that Baltimore implement specified types of planning and zoning regulations, “to promote the health, security, general welfare, and morals of the community.”³¹

Baltimore’s zoning code contains all of the city’s laws pertaining to zoning. Additionally, the city maintains a comprehensive master plan guiding future land use. Many parts of the city’s government participate in the zoning process, including the mayor, the city council, and the city agencies critical to the administration of the zoning code. These agencies include: the department of planning, headed by the planning commission; the office of zoning administration, headed by the zoning administrator; and the department of municipal and zoning appeals, headed by the board of municipal and zoning appeals.³²

D. Limits to Baltimore’s Zoning Authority

1. Federal and State Constitutional Limits

In general, courts will uphold zoning laws that are reasonably or rationally related to protecting the public’s health, safety, morals or welfare as valid exercises of a municipality’s authority.³³ When zoning laws are challenged, courts typically apply a “rational basis standard,” which gives broad deference to the government.³⁴ This standard requires only that a municipality demonstrate a plausible connection between the challenged zoning law and the protection of the public’s health, safety, morals, or welfare. It is relatively easy for a municipality to meet the rational basis standard, and courts rarely strike down a law when it is rationally related to protecting the public’s health, safety, morals or welfare.³⁵

²⁸ CHARTER OF BALTIMORE CITY ART. II.

²⁹ CHARTER OF BALTIMORE CITY ART. II § 7.

³⁰ *Euclid v. Ambler Realty* 272 U.S. 365.

³¹ MD CODE ANN. ART. 66B (West 2009).

³² BALTIMORE DEPARTMENT OF PLANNING CONSULTATION HOME, TRANSFORM BALTIMORE, ZONING CODE DIAGNOSIS – August Draft,

http://www.transformbaltimore.net/portal/transform_baltimore/codediagnosis?pointId=1219242453212#section-1219242453212 (last visited Dec. 3, 09).

³³ *See Euclid v. Ambler Realty* 272 U.S. at 395; *See also* J.C. Juergensmeyer & T.E. Roberts, *Land Use Planning and Control Law* (West Group 1998) at 111.

³⁴ R. Creighton, *Cheeseburgers, Race, and Paternalism: Los Angeles' Ban on Fast Food Restaurants*, 30 J. LEGAL MED. 249 (April - June 2009).

³⁵ *Id.*

Even zoning laws enacted with proper authority are subject to certain limitations – mainly Baltimore’s zoning laws cannot violate “fundamental rights”³⁶ or those rights explicitly or implicitly granted by either the U.S. or the Maryland Constitution, such as the right to free speech. Possible constitutional challenges to zoning laws include: Equal Protection;³⁷ Due Process;³⁸ Takings;³⁹ Commerce;⁴⁰ and First Amendment.⁴¹ However, it is unlikely that a zoning law enacted to protect public health will be overturned on any of these bases.⁴²

2. Federal and State Preemption

A third consideration, after limits imposed by the U.S. and Maryland constitutions, is the concept of preemption. For the purposes of this Report, preemption refers to the invalidation of local law when it conflicts with federal or state law.⁴³ As a hypothetical example, imagine a state enacting a nutrition-labeling law. Since the state has already exercised authority over the area of nutrition-labeling, municipalities would be preempted or denied the ability to enact local nutrition-labeling regulations. However, since zoning is an almost exclusively local authority, it is again unlikely for changes to a municipality’s zoning code to conflict with either state or federal law.

3. Baltimore’s Comprehensive Plan

In May 2009, Maryland adopted a set of legislation encompassing three bills, referred to as Smart, Green and Growing Legislation, to protect the state’s environment and natural resources, and to promote sustainable growth, also referred to as smart growth.⁴⁴ Under the legislation, local governments must establish their own goals via a comprehensive plan, and laws enacted to reach these goals must be consistent with Maryland’s planning visions. The 2009 legislation replaced the State’s eight existing planning visions with 12 new visions that address quality of life and sustainability, public participation, growth areas, community design, infrastructure, transportation, housing, economic development, environmental protection, resource conservation, stewardship, and implementation approaches.⁴⁵ Note that local jurisdictions are required to include the visions in their local comprehensive plans and implement

³⁶ *Black’s Law Dictionary*, 6th Ed. St. Paul: West Publishing Co, 1990.

³⁷ U.S. CONST. AMEND. XIV.

³⁸ *Id.*

³⁹ U.S. CONST. AMEND. V (applied to States through U.S. CONST. AMEND XIV).

⁴⁰ U.S. CONST. ART. I SEC. VIII. CL. III.

⁴¹ U.S. CONST. AMEND. I.

⁴² See *Mair, The Use of Zoning to Restrict Fast Food Outlets (2005)* at 39 (noting that the challenges that have been raised against certain zoning restrictions have, for the most part, failed).

⁴³ Federal preemption is inherent in our constitutional structure, see U.S. CONST. ART. VI, ¶ 2 (“Supremacy Clause”).

⁴⁴ MARYLAND DEPT OF PLANNING, 2009 LEGISLATION SMART, GREEN & GROWING: MDP AND THE 2009 GENERAL ASSEMBLY, <http://www.mdp.state.md.us/OurWork/2009Legislation.shtm> (last visited Dec. 15, 2009).

⁴⁵ MARYLAND DEPT OF NATURAL RESOURCES, ADMINISTRATION BILLS, <http://www.dnr.state.md.us/pdfs/admin.pdf> (last visited Dec. 15, 2009).

them through zoning ordinances and regulations, as well as report annually to their respective legislative bodies.⁴⁶ In addition, the legislation clarifies that local jurisdictions must implement and follow the comprehensive plans they adopt.⁴⁷ Zoning laws intended to address healthy food access in Baltimore, for example, would be consistent with the city's comprehensive plan for all city residents to have access to and be aware of quality, fresh food, which includes a goal to "ensure all residents are within 1.5 miles of quality groceries and neighborhood services."⁴⁸ In addition, zoning changes to increase access to healthy foods would be aligned with the goals outlined in the "greening goals" of Baltimore's Sustainability Plan.⁴⁹

4. Generally Impermissible Uses of Zoning

Certain uses of zoning are considered generally impermissible even though they may not directly exceed the previously discussed limitations. These impermissible uses include "contract zoning" and "spot zoning." Both contract zoning and spot zoning issues may arise in the context of "conditional zoning," a means by which municipalities designate permissible uses of land on a site-specific basis.⁵⁰ An example of conditional zoning would be the rezoning of a residential district to allow development of supermarkets while continuing to disallow other commercial uses. Maryland courts will uphold conditional zoning as long as it is "not clearly arbitrary, unreasonable and discriminatory"⁵¹ and does not constitute illegal contract or spot zoning.⁵²

Contract zoning is an agreement between a local government and a property owner where the property owner agrees to a restricted use of his property in exchange for the government's agreement to rezone the property in a way that accommodates the property owner and deviates from the uses allowed within a given zone.⁵³ Maryland law prohibits local government from contracting away the exercise of its zoning powers.⁵⁴

Spot or piecemeal zoning refers to rezoning of an individual or small tract of land so that restrictions on its use are different from that of surrounding properties—solely for the benefit of a particular property owner.⁵⁵ In Maryland, spot zoning is illegal when it does not reasonably

⁴⁶ MARYLAND DEPT. OF PLANNING, 2009 SMART, GREEN, AND GROWING LEGISLATION THE PLANNING VISIONS, <http://www.mdp.state.md.us/pdf/OurWork/SGG/SGG1.pdf> (last visited Dec. 15, 2009). Note that there are reporting requirements to the State's Planning Department under a limited set of circumstances.

⁴⁷ MARYLAND DEPT OF PLANNING, 2009 LEGISLATION SMART, GREEN & GROWING: MDP AND THE 2009 GENERAL ASSEMBLY, <http://www.mdp.state.md.us/OurWork/2009Legislation.shtm> (last visited Dec. 15, 2009).

⁴⁸ http://baltimorecity.gov/government/planning/compplan/downloads/0909/070909_CMPfullplan.pdf at 83.

⁴⁹ The Baltimore Sustainability Plan (April 2009), available at http://www.baltimorecity.gov/government/planning/sustainability/downloads/0509/051509_BCS-001SustainabilityReport.pdf (last visited Dec. 15, 2009).

⁵⁰ *Mair, The Use of Zoning to Restrict Fast Food Outlets* (2005).

⁵¹ *Armstrong v. Mayor and City Council of Baltimore*, 906 A.2d 415, 422 (Md. App. 2006).

⁵² *See Mayor and City Council of Rockville v. Rylyn's Enterprises*, 814 A.2d 469 (Md. App. 2002).

⁵³ *Id.* at 469.

⁵⁴ *Id.* at 505.

⁵⁵ *Cassel v. Mayor and City Council of Baltimore*, 195 Md. 348, 488-89 (Md. App. 1950).

further the general welfare or is not reasonably consistent with a city's comprehensive zoning plan.⁵⁶

E. Baltimore Zoning Administration and Enforcement

The Baltimore City Zoning Administrator is responsible for administering and enforcing the zoning code.⁵⁷ Citizens may report potential code violations by calling '311' or using the online 'CitiTrack Service Request System.'⁵⁸ Violations may also be discovered by Administrator-initiated inspection of uses of land.⁵⁹ Upon learning of a violation that cannot be resolved informally, the Administrator issues a written notice to the property owner.⁶⁰ A property owner who disagrees with the violation may appeal to the Board of Municipal and Zoning Appeals, which has authority to grant variances from the zoning laws.⁶¹ If this effort fails, the next step is to appeal to the court.⁶²

Ordinarily, only public authorities are entitled to seek court review of violations of public laws, such as zoning laws.⁶³ A private individual is not entitled to do so unless he can show that he has suffered special damages (i.e. damages beyond those suffered by the general public).⁶⁴ Thus, while a person accused of a zoning violation may turn to the court for review of a final decision by the Board of Municipal and Zoning Appeals, a person reporting the violation of another cannot do so, unless he suffers special damages.

III. ZONING-RELATED OPTIONS FOR BALTIMORE CITY

A. Introduction of Comparable Cities

For the purpose of evaluating zoning-related options to increase access to healthier foods in Baltimore, four U.S. cities were selected as case studies. The criteria for selection were: (1) population; (2) population change (rate); (3) foreign-born population (percent); (4) population density; (5) metropolitan employment density; (6) income profile; (7) city-suburban poverty

⁵⁶ *Id.* at 488.

⁵⁷ Zoning Code of Baltimore City, Title II (Administrations; Authorizations), § 2-105.

⁵⁸ See Baltimore City Citizen Services, 311 Online,

https://baltimore.customerservicerequest.org/web_intake_balt/Controller (last visited Dec. 3, 2009).

⁵⁹ See Zoning Code of Baltimore City, Title 2 (Administrations; Authorizations), § 2-105.

⁶⁰ Zoning Code of Baltimore City, Title 17 (Enforcement and Penalties), § 17-101.

⁶¹ *Id.* at § 17-201.

⁶² *Id.* at § 17-301.

⁶³ Committee for Responsible Development on 25th Street v. Mayor and City Council of Baltimore, 767 A.2d 906, 912 (Md. App. 2001).

⁶⁴ *Id.*

disparity (ratio); (8) labor force participation; (9) housing segregation; (10) permitting density; (11) transportation (transit networks); and (12) transit-oriented development market.⁶⁵

Of fifty-four cities measured against these criteria, the four cities most comparable to Baltimore were: (1) Cleveland, Ohio; (2) Milwaukee, Wisconsin; (3) Washington, District of Columbia; and (4) Philadelphia, Pennsylvania. Each of the four “comparable cities” has governing and lawmaking power over local affairs (home rule authority) similar to that of Baltimore.⁶⁶ In addition, the local governments of each of the comparable cities are engaged in efforts to improve the nutritional landscape, primarily by promoting access to local, fresh foods.

For each of the four comparable cities, examples of programs or policies that support the Baltimore City Food Policy Task Force’s zoning-related recommendations are explored below.⁶⁷ Where appropriate, examples are taken from other cities from the original list of fifty-four cities.

B. Supporting Urban Agriculture

“Urban agriculture” encompasses two related concepts: community gardening and urban farming. Community gardens tend to be not-for-profit and small, and are operated by a group of locals to grow produce. Urban farms are the opposite – they tend to be for profit, span one or more city blocks, and are run by vocational farmers who grow produce and raise livestock to sell. These two variants of urban agriculture both take advantage of a municipality’s vacant lots to facilitate the production of fresh and healthy foods.

Within the four comparable cities, urban agriculture was the best-represented of the four Task Force recommendations. A number of related strategies have been suggested for supporting urban agriculture through zoning such as: (1) creating a new type of zoning district exclusively for urban agriculture; (2) adding urban agriculture as a permissible use in certain zoning districts; and (3) defining urban agriculture as an acceptable way for citizens to use public land.⁶⁸ This last recommendation would allow for community use of vacant lots, and is more likely to be used in conjunction with community gardening, but not urban agriculture.

⁶⁵ For additional information, contact Seema Iyer, Ph.D, Division Chief, Baltimore City Department of Planning, Research and Strategic Planning. Or open the following spreadsheet: [\[link\]](#).

⁶⁶ See OH. CONST. ART. 18 SEC. 7; WISC. CONST. ART. XI SEC. 3; DISTRICT HOME RULE ACT OF 1973 (Pub. L. 93-198, Dec. 24, 1973, 87 Stat. 774); PA. CONST. ART. IX SEC. 2.

⁶⁷ In addition to the programs and policies discussed in the text of this report, a fairly exhaustive list of all programs and policies in the four “comparable cities” (as of October 2009) is documented in the following spreadsheet:

 Harrison Institute
Comparable City Res.

⁶⁸ See Hodgson, *Regulation of Food Access through Comprehensive Planning and Zoning* at 9 (discussing these three categories of zoning options).

These strategies all respond to the concern that cities view urban agriculture as, at best, an “interim” use of land.⁶⁹ A perceived lack of permanence may hinder a potential community gardener from investing the time and effort required to set up his/her garden. If the zoning code made a clear provision for urban agriculture, then both gardeners and farmers may be more willing to undertake such efforts.

In addition to broad, use-related recommendations, there is a host of zoning code detail that can facilitate (or impede) urban agriculture. For example, whether the code addresses height restrictions for barns, silos, and other agricultural structures or allows permits for agriculture-appropriate fencing are all details to be clarified in the zoning code. In addition, whether members of a community garden sell their produce from inside the lot or at the adjacent curb are all considerations that can encourage or impede urban agriculture. These considerations and more are addressed in a comprehensive primer created for Flint, Michigan (accessible through the footnote below).⁷⁰

The City of Cleveland, one of Baltimore’s “comparable cities,” has attempted to tackle many of these issues. Cleveland chose to carve out a new “urban garden district,”⁷¹ which enables both community gardening and urban farming in its code.⁷² This code provision defines a set of agricultural structures that may be erected on a lot zoned for urban gardening, and also limits their height, and the amount of total lot space that they can occupy.⁷³ It also allows for chain-link fencing which can be six feet in height.⁷⁴ Both the type and height of allowable fencing deviate from the standard fencing rules found elsewhere in the zoning code.

Cleveland’s Director of Planning reported that although there was an initial public resistance to the idea of farms in a city, there has not been a single complaint since the zoning code was amended.⁷⁵ Furthermore, no legal challenges of any type have been brought against the creation of an urban gardening district.⁷⁶

This relative success has prompted Cleveland to consider a second urban agriculture-related zoning change – the creation of an “agricultural overlay” district.⁷⁷ An overlay district is a way to enhance the uses currently permitted on an already-zoned parcel of land. For example, if adjacent city-owned residential and industrial lots have fallen into disuse, the application of an agricultural overlay to these parcels could allow the lots to be used for a new urban farm. This option might be attractive to cities with a large number of lots that are likely to be vacant for an extended period of time.

⁶⁹ J.E. Schukoske, *Community Development Through Gardening: State and Local Policies Transforming Urban Open Space*, 3 N.Y.U. J. LEGIS. & PUB. POL’Y 351, 352 (identifying the “permanence” of a community garden as a central issue in its creation).

⁷⁰ ENP AND ASSOCIATES, FLINT URBAN AGRICULTURAL LEGAL FRAMEWORK BACKGROUND REPORT (2009), available at http://www.thelandbank.org/downloads/Urban_Food_Gardening_Report.pdf. View the document directly by double-clicking on the following icon: .

⁷¹ Zoning Code of Cleveland, Chapter 336 (Urban Garden District) (June 30, 2009), available at: http://caselaw.lp.findlaw.com/clevelandcodes/cco_part3_336.html.

⁷² See *Id.* at § 336.03 (defining “Permitted Main Uses” as “community garden” and “market garden”); See also *id.* at § 336.02 (treating “community gardens” and “market gardens” exactly as discussed in this Report).

⁷³ *Id.* at §§ 336.05(b), 336.05(c)

⁷⁴ *Id.* at § 336.05(g)

⁷⁵ Telephone Interview with Robert Brown, Director, Cleveland City Planning Commission (Nov. 23, 2009).

⁷⁶ *Id.*

⁷⁷ *Id.*

Philadelphia has also used its zoning code to encourage urban agriculture, although more narrowly than Cleveland. Philadelphia did not create new zoning districts – instead, it added to its list of permitted uses within residential districts to allow “agriculture and horticulture, except the commercial keeping or handling of farm stock or poultry; and except commercial greenhouses or establishments for sale of farm or horticultural products.”⁷⁸ The practical effect is that not-for-profit community gardens are allowed in residential districts while commercial farms are not. No comparable permitted uses were added to the commercial or industrial sections of the zoning code. However, Philadelphia is currently planning a Zoning Code Update that will remove unnecessary restrictions associated with certain uses of land, including urban agriculture.⁷⁹ The city intends to recognize urban agriculture as a primary use of land in the new zoning code,⁸⁰ including creating a new zoning designation to permit commercial farming.⁸¹

The zoning code in Milwaukee offers relatively strong support for urban agriculture. For example, the code permits the “raising of crops or livestock” in residential districts.⁸² Community gardens are a permissible use under this provision, as is the keeping of cows, cattle, horses, sheep, swine, goats, chickens, ducks, turkeys, geese or any other domesticated livestock permitted by the health department.⁸³ Given the level of support of urban agriculture within Milwaukee’s zoning code, the greater barrier to urban agriculture in Milwaukee appears to be unavailability of land. The city provides only short-term leases of city-owned plots of land for community gardens.⁸⁴ This use is considered temporary and the sites are often developed for other uses when more permanent opportunities become available.⁸⁵ It is possible that longer lease terms, such as ten years, may encourage more community gardeners as the concern of losing the land for gardening is alleviated with a longer lease.⁸⁶

C. Supporting Farmers’ Markets

In 2008, farmers’ markets were one of the fastest-growing alternative venues for selling

⁷⁸ See Zoning Code of Philadelphia, §14-203 (Residential Related Uses, Non-Residential Uses and Other Permitted Uses), available at

[http://www.amlegal.com/nxt/gateway.dll/Pennsylvania/philadelphia_pa/title14zoningandplanning/chapter14-200residentialdistricts?f=templates\\$fn=altmain-nf.htm\\$3.0#JD_Chapter14-200](http://www.amlegal.com/nxt/gateway.dll/Pennsylvania/philadelphia_pa/title14zoningandplanning/chapter14-200residentialdistricts?f=templates$fn=altmain-nf.htm$3.0#JD_Chapter14-200).

⁷⁹ Philadelphia Zoning Code Update: Detailed Recommendations for the New Zoning Code (2009) at 60, available at http://www.zoningmatters.org/files/Draft_Recommendations_for_a_New_Zoning_Code_0.pdf.

⁸⁰ *Id.*

⁸¹ New Philadelphia Zoning Code, Best Practices Report — DRAFT (June 2009) at 9, available at http://www.zoningmatters.org/files/Best_Practices_Report.pdf.

⁸² Milwaukee Zoning Ordinance, Subchapter 5 Residential Districts, Table 295-503-1 (Residential Districts Use Table), available at <http://www.mkedcd.org/czo/>.

⁸³ *Id.* at Subchapter 2 Definitions and Rules of Measurement, “R” Terms: 473.

⁸⁴ M.B. Mikolajewski, *Milwaukee Community Gardens: Current Trends and Recommendations* (2002) at 17, available at <http://www4.uwm.edu/SARUP/gallery/planning/planstudentpdf/milwaukeecommunitygardens.pdf>.

⁸⁵ *Id.*

⁸⁶ *Id.* at 36.

food in the U.S.⁸⁷ Farmers' markets often provide fresh produce and can increase access to healthy foods in areas without supermarkets, particularly underserved areas.⁸⁸

Farmers' markets have at least one frustration in common with urban agriculture – the challenges faced by a perceived lack of permanence.⁸⁹ Finding a location for farmers' markets in otherwise crowded cities is difficult. That difficulty can be compounded when market operators must constantly re-apply for street closure permits.

Incentivizing farmers' markets, as a separate effort from incentivizing urban agriculture generally, has received less attention in the literature. One way to guarantee permanence is to make the operation of a farmers' market a permitted use within certain zoning districts.⁹⁰ Another way for a municipality to encourage farmers' markets is to engage in "incentive zoning" with its residential developers. Under an incentive zoning scheme, a local zoning board comes up with two lists: a list of promises it would like a developer to make, and a list of zoning concessions that the board is willing to make in return.⁹¹ Residential developers would then have the option of picking an item from each list – a zoning concession that incentivizes them to build, and a return promise to the city, perhaps to operate a farmers' market in its proposed residential development.

The District of Columbia provides an example of "incentive zoning" at work, albeit in a commercial development context. In an effort to create a well-rounded shopping district in its downtown area, the city created a fixed list of "bonus uses" (including department stores, movie theaters, and performing arts spaces), and offered extra square footage for developers who pursued these bonus uses.⁹² Similarly, a city intent on increasing the number of farmers' markets might offer developers a streamlined licensing process, or a selection of prime residential locations from the city's land bank, or even extra square footage – in return for creating space for farmers' markets in their development plans.

Philadelphia has made farmers' markets a permitted use within certain commercial zones.⁹³ However, this permitted use is relatively restricted, as the uses in the applicable section must be within a "completely enclosed building" unless otherwise specified.⁹⁴ As with urban agriculture, Philadelphia intends to address current limitations on farmers' markets in its Zoning Code Update. For instance, allowing farmers' markets in a broader range of zoning districts⁹⁵

⁸⁷ BALTIMORE CITY FOOD POLICY TASK FORCE, REPORT AND RECOMMENDATIONS (2009-10) at 13.

⁸⁸ *Id.*

⁸⁹ B. McCann, *Community Design for Healthy Eating* (2006) at 11, available at <http://www.rwjf.org/files/publications/other/communitydesignhealthyeating.pdf>.

⁹⁰ See Hodgson, *Regulation of Food Access through Comprehensive Planning and Zoning* at 8.

⁹¹ Mair, *The Use of Zoning to Restrict Fast Food Outlets* (2005) at 24 (describing the general framework for incentive zoning).

⁹² See DC Zoning Regulations at §11-1703, available at <http://www.dcregs.org/Notice/Download.aspx?VersionID=554760>.

⁹³ See Zoning Code of Philadelphia at §14-303, available at [http://www.amlegal.com/nxt/gateway.dll/Pennsylvania/philadelphia_pa/title14zoningandplanning/chapter14-300commercialdistricts?f=templates\\$fn=altmain-nf.htm\\$3.0#JD_Chapter14-300](http://www.amlegal.com/nxt/gateway.dll/Pennsylvania/philadelphia_pa/title14zoningandplanning/chapter14-300commercialdistricts?f=templates$fn=altmain-nf.htm$3.0#JD_Chapter14-300).

⁹⁴ *Id.* at § 14-303(1)(a) (Use Regulations – General).

⁹⁵ New Philadelphia Zoning Code, Best Practices Report — DRAFT (June 2009) at 8, available at http://www.zoningmatters.org/files/Best_Practices_Report.pdf.

and making them a permitted use in areas of the city not adequately served with fresh food stores or vendors.⁹⁶

Unfortunately, although Milwaukee has made a number of efforts to improve food access, its zoning code contains a number of barriers for farmers' markets. "Outdoor merchandise sales" are not allowed in residential districts, and are only allowed with special permits in commercial districts. Even in industrial-mixed districts, farmers' markets cannot come within 150 feet of residential use land.⁹⁷

D. Improving the Food Environment Near Schools and Recreation Centers

Many schools and recreation centers are surrounded by fast food restaurants and corner stores. The close proximity allows students easy access to unhealthy foods and may undermine schools' efforts to offer nutritious meals.⁹⁸ Recent research found that students with fast-food restaurants within one half-mile of their schools consumed fewer servings of fruits and vegetables, consumed more servings of soda, and were more likely to be overweight and obese than students in schools that were not near fast-food restaurants.⁹⁹ Food environments around schools and recreation centers can be improved in two ways: (1) by restricting access to unhealthy foods; and/or (2) by increasing access to healthy foods. Zoning-related options tend to focus on restricting access although this approach may be more politically challenging.¹⁰⁰

The general sentiment is that creating health-oriented zoning regulations around schools (affecting children) would be easier than attempting to do so throughout a city (affecting the general public). Prior successful restrictions of alcohol and tobacco sales or advertising near schools support this expectation.¹⁰¹ The Institute of Medicine's Committee on Childhood Obesity Prevention Actions for Local Governments supports the use of zoning to "discourage the consumption of calorie-dense, nutrient-poor foods and beverages."¹⁰² Among the committee's recommendations are: (1) land use and zoning policies that restrict fast food establishments near school grounds and public playgrounds; and (2) local ordinances that restrict mobile vending of

⁹⁶ *Philadelphia Zoning Code Update* at 60.

⁹⁷ See Milwaukee Zoning Ordinance, *supra* at 88, at §§ 295-503, 295-603, and 295-803, available at <http://www.mkedcd.org/czo/>.

⁹⁸ NATIONAL POLICY AND LEGAL ANALYSIS NETWORK TO PREVENT CHILDHOOD OBESITY, CREATING A HEALTHY FOOD ZONE AROUND SCHOOLS: A FACT SHEET FOR ADVOCATES (2009), available at http://nplanonline.org/files/HealthyFoodZone_FactSht_FINAL_091008.pdf.

⁹⁹ B. Davis, & C. Carpenter, *Proximity of Fast-Food Restaurants to Schools and Adolescent Obesity* (2009), 99 AM. J. PUB. HEALTH 1 AT 1-6.

¹⁰⁰ See BALTIMORE CITY FOOD POLICY TASK FORCE, REPORT AND RECOMMENDATIONS (2009-10).

¹⁰¹ See ENACT Local Policy Database, http://www.preventioninstitute.org/SA/policies/policy_detail.php?s_Search=detroit&policyID=54 (last visited Dec. 8, 2009).

¹⁰² THE INSTITUTE OF MEDICINE COMMITTEE ON CHILDHOOD OBESITY PREVENTION ACTIONS FOR LOCAL GOVERNMENTS, LOCAL GOVERNMENT ACTIONS TO PREVENT CHILDHOOD OBESITY, REPORT BRIEF (Sep. 2009) at 5, available at <http://www.iom.edu/en/Reports/2009/ChildhoodObesityPreventionLocalGovernments.aspx>.


calorie dense, nutrient-poor foods near schools and public playgrounds.¹⁰³ Sample language for creating such policies is available in a report published by the National Policy & Legal Analysis Network to Prevent Childhood Obesity.¹⁰⁴

While none of the four “comparable cities” have yet taken the approach of restricting unhealthy food sources near schools, Detroit offers an example of this type of land use regulation. Detroit’s zoning ordinance requires a minimum distance of 500 feet between certain carry-out, fast food, and drive-in restaurants and the nearest elementary, junior high or senior high school (See Appendix A).¹⁰⁵ The city’s Buildings and Safety Engineering Department, which administers and enforces the code, reserves the right to waive the spacing requirement when the distance at issue is at least 450 feet and when allowing a waiver would not be contrary to public interest.¹⁰⁶ For distances less than 450 feet, the city’s Board of Zoning Appeals must approve any waiver request.¹⁰⁷ Youth exposure to marketing of unhealthy foods was cited among the reasons for the zoning ordinance along with concerns over exposure to “highly processed, minimally nutritious foods associated with unhealthy diets....”¹⁰⁸ There is no indication that the ordinance, enacted in 1978, has ever been challenged on legal grounds.

In addition to restricting access to unhealthy food sources, zoning can be used to promote school children’s access to fresh, healthy foods. School gardens are one means of supporting this goal, by allowing students to grow and eat their own fresh produce. Locally sourced food is generally more fresh and nutritious than food shipped from a distance and stored for long periods of time.¹⁰⁹ As part of its Greenworks Initiative, Philadelphia plans to support the creation of school gardens as part of the city’s goal of “bring[ing] local food within 10 minutes of 75 percent of residents.”¹¹⁰ However, Philadelphia’s zoning laws do not currently protect school gardens as a permissible use of land.¹¹¹ While the code does not actually prohibit agricultural land use in school districts, the city could offer greater protection by adding an explicit allowance for gardening and related building structures such as greenhouses.

¹⁰³ *Id.*

¹⁰⁴ NATIONAL POLICY & LEGAL ANALYSIS NETWORK, MODEL HEALTHY FOOD ZONE ORDINANCE (2008), available at http://nplanonline.org/files/HealthyFoodZone_Ordinance_FINAL_091008.pdf. View the document directly by

double-clicking on the following icon:


¹⁰⁵ Mair, *The Use of Zoning to Restrict Fast Food Outlets: A Potential Strategy to Combat Obesity* (2005) at 52; see also, Detroit Code, Chapter 61: Zoning Ordinance, § 61-12-91, <http://www.detroitmi.gov/legislative/BoardsCommissions/CityPlanningCommission/docs%20for%20posting/Ch%2061%20November%201,%202008%20update.pdf>.

¹⁰⁶ Detroit Code, Chapter 61: Zoning Ordinance, § 61-12-95 and 96.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ PUBLIC HEALTH LAW & POLICY, HEALTHY PLANNING POLICIES: A COMPENDIUM FROM CALIFORNIA GENERAL PLANS (2009) at 55, available at <http://www.phlpnet.org/healthy-planning/products/healthy-planning-policies>.

¹¹⁰ PHILADELPHIA MAYOR’S OFFICE OF SUSTAINABILITY, GREENWORKS PHILADELPHIA at 52-54, http://www.phila.gov/green/greenworks/PDFs/Greenworks_OnlinePDF_FINAL.pdf (last visited Dec. 5, 2009).

¹¹¹ See PHILADELPHIA CODE, CHAPTER 14: ZONING AND PLANNING, § 500 (Industrial Districts), [http://www.amlegal.com/nxt/gateway.dll/Pennsylvania/philadelphia_pa/thephiladelphiacode?fn=altmain-nf.htm\\$?templates\\$3.0&vid=amlegal:philadelphia_pa](http://www.amlegal.com/nxt/gateway.dll/Pennsylvania/philadelphia_pa/thephiladelphiacode?fn=altmain-nf.htm$?templates$3.0&vid=amlegal:philadelphia_pa) (last visited Dec. 5, 2009).

E. Creating Healthy Food Zoning Requirements and Incentives

Many lower-income, underserved neighborhoods feature far more opportunities to buy junk food and fast food than healthy food. There are several zoning- and incentive-related options available to address this imbalance. Some approaches aim to restrict unhealthy options- like banning fast food restaurants, while others seek to attract healthy options- like incentivizing full service grocery stores.

In 2008, Los Angeles, California put a one year freeze (“moratorium”) on the development of new fast food restaurants in certain lower-income areas of the city.¹¹² Unlike the Detroit zoning ordinance, which bans fast food restaurants within 500 feet of schools,¹¹³ the Los Angeles moratorium affects the general public and not just children. The targeted areas are said to have the highest concentration of fast food restaurants in the city. The moratorium is intended to give the city time to attract restaurants that offer healthier food options. This appears to be the first time a local government has prohibited a particular style of restaurant specifically for health reasons.

As the first of its kind, the Los Angeles moratorium does not come without controversy. Challengers say the restaurant industry is not to blame for the city’s obesity problem.¹¹⁴ And, that the moratorium “ignor[es] the good things their franchises accomplish,” like providing jobs and offering nutritious menu options.¹¹⁵ There has also been public opposition of the ban by people who feel that while “[i]t’s true that food options in low-income neighborhoods are, on average, worse than the options in wealthier neighborhoods[,] restricting options in low-income neighborhoods is a disturbingly paternalistic way of solving the problem.”¹¹⁶ While there have not yet been any lawsuits brought against the moratorium, the legislation could face legal opposition.¹¹⁷

Financial incentives are also a powerful means of encouraging retailers to offer healthier food options in underserved neighborhoods. A decade ago, national studies showed that Philadelphia had the second lowest number of supermarkets per capita of major cities in the

¹¹² Los Angeles, Cal., Ordinance 180103 (Jul. 29, 2008), available at http://clkrep.lacity.org/online/docs/2007/07-1658_ord_180103.pdf. It is unclear whether the Moratorium has attracted restaurants offering healthier food options in lower-income areas of the city as there is currently no publishable evidence demonstrating this effect.

¹¹³ See *supra*, note 96 (citing Mair, *The Use of Zoning to Restrict Fast Food Outlets: A Potential Strategy to Combat Obesity* (2005) at 52).

¹¹⁴ Daily Dish Blog, Council Bans New Fast-Food Outlets in South L.A., LOS ANGELES TIMES (July 30, 2008), available at <http://articles.latimes.com/2008/jul/30/local/me-fastfood30> (last visited Dec. 8, 2009).

¹¹⁵ *Id.*

¹¹⁶ R. Creighton, *Cheeseburgers, Race, and Paternalism* (2009) at 256.

¹¹⁷ See *id.* at 259; see also *supra*, Section II(D), Limits to Baltimore City’s Zoning Authority.

U.S..¹¹⁸ Lack of food access was particularly severe in lower income neighborhoods and was linked to high rates of diet-related diseases such as obesity and diabetes.¹¹⁹ In 2004, the Food Trust, a Philadelphia-based non-profit group, partnered with The Reinvestment Fund and the Greater Philadelphia Urban Affairs Coalition and founded the Pennsylvania Fresh Food Financing Initiative (FFFI). The initiative serves the financing needs of supermarket operators that plan to operate in underserved communities where infrastructure costs and credit needs cannot be filled solely by conventional financial institutions.¹²⁰ As of June 2009, FFFI committed \$57.9 million in grants and loans to 74 supermarket projects in 27 Pennsylvania counties, and is considered a model for communities nationwide committed to combating obesity and improving food access.¹²¹

New York City is an example of a community that has used Pennsylvania's FFFI as a model for improving its own nutritional landscape.¹²² The New York Food Retail Expansion to Support Health (FRESH) Program was recently established to promote grocery stores in underserved areas of New York City by combining financial and zoning incentives.¹²³ Zoning incentives include: (1) additional floor area for grocery stores in mixed use buildings (e.g. in a residential building, one additional square foot of residential floor area is allowed for every square foot provided for a FRESH food store up to 20,000 square feet); (2) a reduction in the number of required parking spaces in pedestrian-oriented neighborhoods for which current parking requirements are unnecessarily high; and (3) larger as-of-right stores in light manufacturing areas (eliminating the need for a special permit and its costly and lengthy review).¹²⁴ Participating stores must be certified as FRESH by meeting certain criteria, including dedicating at least 30 percent of the selling area to the sale of perishable goods that must include dairy, fresh produce, and frozen foods, and may include fresh meats, poultry, and fish.¹²⁵ The program also requires a continuing commitment from the retailer.

¹¹⁸ K. Morland, A.V. Diez Roux & S. Wing, *Supermarkets, Other Food Stores, and Obesity* (2006), 30 AM J PREV MED. 333 at 333 –39.

¹¹⁹ *Id.*

¹²⁰ The Food Trust, Pennsylvania Fresh Food Financing Initiative, <http://www.thefoodtrust.org/php/programs/fffi.php> (last visited Dec. 05, 2009).

¹²¹ *Id.*

¹²² In 2008, The Food Trust, a Philadelphia-based non-profit organization that was instrumental in creating FFFI, published a report highlighting the scarceness of supermarkets in New York. The 2008 report, *The Need For More Supermarkets in New York*, is available at <http://www.thefoodtrust.org/pdf/SupermarketsNewYork.pdf> (last visited Jan. 13, 2009). A follow-up report in 2009 made policy recommendations to encourage supermarket development in New York. The 2009 report, *Stimulating Supermarket Development: A New Day for New York*, is available at <http://www.thefoodtrust.org/pdf/0509nycommission.pdf> (last visited Jan. 13, 2009).

¹²³ New York City Government, Food Retail Expansion to Support Health <http://www.nyc.gov/html/misc/html/2009/fresh.shtml> (last visited Dec. 5, 2009).

¹²⁴ *Id.*

¹²⁵ *Id.*

In 2008, New York City launched an initiative supporting more immediate access to fresh, healthy foods in underserved neighborhoods— “NYC Green Carts.” Green Carts are mobile food carts that sell only fresh fruits and vegetables in neighborhoods with limited access to produce.¹²⁶ Vendors need both a license (for the vendor) and a permit (for the cart) to operate a Green Cart.¹²⁷ Each Green Cart permit allows a cart to operate in one New York City borough only. Within each borough, Green Carts can only operate in certain designated areas. Since New York City caps the total number of mobile vending permits granted in each borough, and a certain number of permits are allocated for Green Carts, applicants for Green Carts have an advantage over applicants for general permits.

The Washington, D.C. government has partnered with On The Fly in support of a similar healthy street vendor program— SmartKarts. SmartKarts are electronic mobile food carts that provide hot entrees, snacks, and drinks that are mostly natural, organic and chemical-free.¹²⁸ According to Harriet Tregoning, Director of Office of Planning for Washington, D.C. Government, SmartKarts are “zero-emission, smart, sustainable and provide healthy options for [D.C.] workers and residents where they are, so people do not have to drive to find an organic yogurt, Honest Tea, or vegetarian taco.”¹²⁹

IV. CONCLUSION

The inability to access healthy foods in Baltimore is a serious problem associated with diseases that rank among Baltimore’s leading killers. It also has ramifications for pediatric development and disproportionately affects the poor.

Baltimore can use its zoning authority to encourage the creation of healthy food environments that will help diminish the prevalence of obesity and diet-related disease. More grocery stores, more community gardens and farmers’ markets, and fewer fast food restaurants are all realities that can be facilitated by the zoning code.

While there are legal considerations such as constitutional limits, potential conflicts with federal or state law, avoidance of “spot” and “contract” zoning practices, or other considerations such as consistency with Baltimore’s comprehensive zoning plan, Baltimore’s use of zoning to promote public health is well within its authority. Courts have long recognized Baltimore’s authority to zone to protect the health, safety, or morals of its citizenry.

As seen in other cities, there are a number of options available to Baltimore to improve its nutritional landscape through its zoning code. Baltimore can alleviate the sense of impermanence associated with urban agriculture by creating new “community garden” districts in its zoning code. It can encourage farmers markets by making market activities explicitly

¹²⁶ New York City Government, New York City Green Carts, http://www.nyc.gov/html/doh/html/cdp/cdp_pan_green_carts.shtml (last visited Dec. 6, 2009).

¹²⁷ *Id.*

¹²⁸ On The Fly, <http://www.dconthefly.com/everything.php> (last visited Dec. 8, 2009).

¹²⁹ *Id.* (Press Release Nov. 27, 2007).

permitted uses within commercial zones. It can also require fast food restaurants to maintain a certain distance from schools, making it harder for children to access unhealthy foods while at school. Alternatively or simultaneously, it could opt for more diverse options, such as financially incentivizing grocery stores or encouraging healthy mobile food vending.

APPENDIX A - Select Zoning Ordinance Provisions

CLEVELAND, OH ¹³⁰ - PROVISIONS ON URBAN AGRICULTURE	
Select Provisions	
Sec. 336.01. Urban Garden District	<p>The “Urban Garden District” is hereby established as part of the Zoning Code to ensure that urban garden areas are appropriately located and protected to meet needs for local food production, community health, community education, garden-related job training, environmental enhancement, preservation of green space, and community enjoyment on sites for which urban gardens represent the highest and best use for the community.</p> <p>(Ord. No. 208-07. Passed 3-5-07, eff. 3-9-07)</p>
Sec. 336.02. Definitions	<p>(a) "Community garden" means an area of land managed and maintained by a group of individuals to grow and harvest food crops and/or non-food, ornamental crops, such as flowers, for personal or group use, consumption or donation. Community gardens may be divided into separate plots for cultivation by one or more individuals or may be farmed collectively by members of the group and may include common areas maintained and used by group members.</p> <p>(b) "Market garden" means an area of land managed and maintained by an individual or group of individuals to grow and harvest food crops and/or non-food, ornamental crops, such as flowers, to be sold for profit.</p>
Sec. 336.03. Permitted Main Uses	<p>Only the following main uses shall be permitted in an Urban Garden District:</p> <p>(a) community gardens which may have occasional sales of items grown at the site;</p> <p>(b) market gardens, including the sale of crops produced on the site.</p> <p>(Ord. No. 208-07. Passed 3-5-07, eff. 3-9-07)</p>

¹³⁰ Cleveland Zoning Code available at http://caselaw.lp.findlaw.com/clevelandcodes/cco_part3_336.html.

DETROIT, MI ¹³¹ - PROVISIONS ON SCHOOL ENVIRONMENTS & FAST FOOD

Definitions

Sec. 61-16-162. Restaurant, carry-out	An establishment whose principal business is the sale of foods, frozen desserts, or beverages to the customer in a ready-to-consume state, and whose design or method of operation includes both of the following characteristics: [1] foods, frozen desserts, or beverages are usually served in edible or disposable containers. [2] the consumption of foods, frozen desserts, or beverages within the restaurant building, within a motor vehicle parked upon the premises, or at other facilities on the premises outside the restaurant building, is posted as being prohibited, and such prohibition is strictly enforced by the restaurateur.
Sec. 61-16-162. Restaurant, Fast food	An establishment whose principal business is the sale of foods, frozen desserts, or beverages to the customer in a ready-to-consume state for consumption either within the restaurant building or for carry-out with consumption off the premises, whose delivery of food to the customer may include service via a drive-up or outdoor walk-up pass-through window, and whose design or principal method of operation includes both of the following characteristics. [1] Foods, frozen desserts, or beverages are usually served in edible containers or disposable containers. [2] The consumption of foods, frozen desserts, or beverages within a motor vehicle parked upon the premises, or at other facilities on the premises outside the restaurant building other than designated and approved outdoor eating areas, is posted as being prohibited, and such prohibition is strictly enforced by the restaurateur.
Sec. 61-16-162. Schools (Use Category) (Ord. No. 44-06, §1, 12-21-06)	Public or private schools at the primary, elementary, middle, junior high, or high school level that provide state-mandated basic education. Examples include public and private daytime (elementary, junior high and senior high) schools, and military academies. Charter schools are public schools. Preschools are classified as Day Care uses; however, a preschool “Head Start” program shall be considered as an accessory use where located on the premises of an operating school (See also Sec. 61-12-402). Business and trade schools are classified as Retail Sales and Service. Boarding schools are classified as Institutional Living uses.

Select Provisions

Sec. 61-12-91. Retail, service, and commercial uses.	Use Type	Minimum Distance from Other Use Types (Existing or Approved)
	Restaurant, carry-out or fast-food	School (not including Educational institutions): 500 feet

¹³¹ Detroit Zoning Code available at http://www.detroitmi.gov/legislative/BoardsCommissions/CityPlanningCommission/planning_zoning.htm.

<p>Sec. 61-12-95. Waiver of general spacing requirements.</p>	<p>Except for Controlled Uses, only the Board of Zoning Appeals may adjust the spacing requirements between land uses, as provided for in the tables in Sec. 61-12-89, Sec. 61-12-90, Sec. 61-12-91, Sec. 61-12-92, and Sec. 61-12-94 of this Code, as a “locational variance” in accordance with the criteria specified in Sec. 61-4-81 of this Code and where the proposed use satisfies all the following conditions:</p> <ol style="list-style-type: none"> (1) All other applicable regulations within this Zoning Ordinance or this Code will be observed; (2) The proposed use will not be contrary to the public interest or injurious to nearby properties in the proposed location, and the spirit and intent of the purpose of the spacing regulations will still be observed; (3) The proposed use will not aggravate or promote a deleterious effect upon adjacent areas through causing or encouraging blight, and will not discourage investment in the adjacent areas or cause a disruption in neighborhood development; and (4) The establishment of the use in the area will not be contrary to any program of neighborhood conservation or interfere with any program of urban renewal. <p>(Ord. No. 11-05, §1, 5-28-05)</p>
<p>Sec. 61-12-96. Waiver of spacing from schools.</p>	<p>(a) The prohibition that relates to the location of a use, referenced in the tables in Sec. 61-12-89 through Sec. 61-12-94 of this Code, within five hundred (500) radial feet of a school site may be waived by:</p> <ol style="list-style-type: none"> (1) The Buildings and Safety Engineering Department, provided, that the proposed use is at least four hundred-fifty (450) radial feet from the school site; or (2) The Board of Zoning Appeals where the proposed use is less than four hundred fifty (450) radial feet from the school site. <p>(b) The waiver of the prohibition is subject to a finding based on evidence presented at a public hearing that the establishment of the use will not impede the normal and orderly development, operation, and improvement of the school.</p> <p>(c) Such waiver shall be documented by a statement of facts upon which such determination was made and shall indicate that such use would not be injurious or harmful to the school.</p> <p>(Ord. No. 11-05, §1, 5-28-05)</p>
<p>Sec. 61-13-141. Distance measurements.</p>	<p>Except where linear measurement is indicated, for zoning purposes, all distances shall be measured radially. In other words, for regulatory purposes, the minimum distance between two points shall be the length of an imaginary straight line joining those points. Linear measurement is defined in Sec. 61-16-123 of this Code and radial measurement is defined in Sec. 61-16-161 of this Code. (See Figure 61-12-87)</p>
<p>Sec. 61-16-161. Radial measurement</p>	<p>Radial measurement between two points is a straight line connecting two points, drawn irrespective of intervening property lines, rights-of-way or natural or built environment. When notification is required to be given within a three hundred (300) foot radius of a rectangular zoning lot, for example, all points three hundred (300) feet distant from the lot lines are connected to create an oval-like shape. Similarly when a land use is prohibited within a specified distance from a given point all points at the specified distance are connected to create an oval-like shape, as illustrated in Figure 61-12-87.</p>
<p>Figure 61-12-87. Spacing Measurement</p>	<p>Distance from nearest zoning lot boundary to other use types. Refer to tables for required distance.</p>

